

Short Title: Will/Correct Mistake/Achieve Tax Objective.

A BILL TO BE ENTITLED
AN ACT TO PROVIDE FOR THE JUDICIAL REFORMATION OF WILLS TO CORRECT
MISTAKES AND THE JUDICIAL MODIFICATION OF WILLS TO ACHIEVE THE
TESTATOR'S TAX OBJECTIVES.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 31 of the General Statutes is amended by adding a new Article to
read:

"Article 10.

"Reformation or Modification of Wills.

"§ 31-61. Reformation of a will to correct mistakes.

In accordance with this Article, the court may reform the terms of a will, even if
unambiguous, to conform the terms to the testator's intent if it is proved by clear and convincing
evidence what the testator's intent was and that the terms of the will were affected by a mistake
of fact or law, whether in expression or inducement.

"§ 31-62. Modification of a will to achieve the testator's tax objectives.

In accordance with this Article, the court may modify the terms of a will in a manner that
is not contrary to the testator's probable intent to achieve the testator's tax objectives. The court
may provide that the modification has retroactive effect.

"§ 31-63. Filing of application for reformation or modification of a will.

(a) An application for reformation or modification of a will under this Article may be
filed at the time of an application for probate of the will, and the probate thereof in common
form, or at any time within three years thereafter, by any party interested in the estate, in person
or by attorney, with the clerk of the superior court having jurisdiction of the estate. An
application also may be filed by any interested party as part of a proceeding for probate of a will
in solemn form under G.S. 28A-2A-7 or a proceeding to caveat a will under Article 6 of this
Chapter. After the filing of an application, any interested party may initiate a caveat proceeding
in order for the application to be considered as a part of the caveat proceeding. If the application
is not adjudicated as part of a proceeding to probate the will in solemn form or as part of a caveat
proceeding, the court shall consider the application without a jury.

(b) The application under this Article shall be filed by the clerk of superior court in
the decedent's estate file.

(c) If a will has been previously probated in solemn form under G.S. 28A-2A-7 or
has been the object of a previous caveat proceeding, any party who was properly served in that
probate in solemn form or caveat proceeding is barred from filing an application under this
Article.

"§ 31-64. Jurisdiction of action.

Jurisdiction of an action commenced under this Article shall be as provided in G.S. 28A-
2-4.

"§ 31-65. Necessary party to action.

The personal representative is a necessary party to an action commenced under this
Article.

"§ 31-66. Cause transferred to trial docket; service; alignment of parties; security bond.

(a) Upon the filing of an application under this Article, the clerk of the superior court
shall transfer the cause to the superior court for trial. The application shall be served upon all
interested parties in accordance with G.S. 1A-1, Rule 4 of the Rules of Civil Procedure. If the

1 application is not made as part of a proceeding to probate the will in solemn form or as part of a
2 caveat proceeding, the application shall so state, and shall state all of the following:

3 (1) Any party interested in the estate may initiate a caveat proceeding under
4 Article 6 of this Chapter within 30 days of the service of the application.

5 (2) If no party initiates a caveat proceeding to adjudicate the application
6 within 30 days of the service of the application, then any party who was
7 properly served is barred from thereafter initiating a caveat proceeding as
8 to the will.

9 (b) After service under subsection (a) of this section, the applicant shall cause notice
10 of a hearing to align the parties to be served upon all parties in accordance with G.S. 1A-1, Rule
11 5 of the Rules of Civil Procedure. At the alignment hearing, all of the parties who wish to be
12 aligned as parties shall appear and be aligned by the court as parties with the applicant or parties
13 with the respondent. If a party does not appear to be aligned or chooses not to be aligned, the
14 court shall dismiss that party from the action, but that party shall be bound by the action.

15 (c) Within 30 days following the entry of an order aligning the parties, any party who
16 was aligned may file a responsive pleading to the application under this Article, however, the
17 failure to respond to any averment or claim of the application shall not be deemed an admission
18 of that averment or claim. An extension of time to file a responsive pleading to the application
19 may be granted as provided by G.S. 1A-1, Rule 6 of the Rules of Civil Procedure.

20 (d) Upon motion of an aligned party, the superior court may require an applicant
21 under this Article to provide security in such sum as the court deems proper for the payment of
22 such costs and damages as may be incurred or suffered by the estate if the estate is found to have
23 been wrongfully enjoined or restrained. The court may consider relevant facts related to whether
24 a bond should be required and the amount of any such bond, including, but not limited to, (i)
25 whether the estate may suffer irreparable injury, loss, or damage as a result of the application and
26 (ii) whether the application has substantial merit. Provisions for bringing suit in forma pauperis
27 apply to this subsection.

28 **"§ 31-67. Effect of application on estate administration.**

29 (a) Upon the filing of an application under this Article, the clerk of superior court
30 shall issue an order that applies during the pendency of the application to any personal
31 representative and that provides all of the following:

32 (1) That there shall be no distributions of assets of the estate to any
33 beneficiary, except upon approval of the clerk in accordance with the
34 procedures of subsection (b) of this section.

35 (2) That no commissions shall be advanced or awarded to any personal
36 representative, except upon approval of the clerk in accordance with the
37 procedures of subsection (b) of this section.

38 (3) That the personal representative shall file all accountings required by the
39 clerk of superior court and that the personal representative may pay any
40 applicable filing fees associated with those accountings from the assets of
41 the estate.

42 (4) That the personal representative shall preserve the property of the estate
43 and that the personal representative is authorized to pursue and prosecute
44 claims that the estate may have against others.

45 (5) That the personal representative may file all appropriate tax returns and
46 that the personal representative may pay, in accordance with the

procedures of subsection (b) of this section: taxes; funeral expenses of the decedent; debts that are a lien upon the property of the decedent; bills of the decedent accrued before death; claims against the estate that are timely filed; professional fees related to administration of the estate, including fees for tax return preparation, appraisal fees, and attorneys' fees for estate administration.

(b) In regard to payment of any of the items listed in subdivisions (1), (2), and (5) of subsection (a) of this section, the personal representative shall file with the clerk a notice of the personal representative's intent to pay those items and shall serve the notice upon all parties to the application in accordance with G.S. 1A-1, Rule 4 of the Rules of Civil Procedure. If within 10 days of service any party files with the clerk a written objection to that payment, the clerk shall schedule a hearing and determine whether the proposed payment shall be made. If no such objection is filed with the clerk, the clerk may approve the payment without hearing, and upon that approval, the personal representative may make the payment. The parties to the application may consent to any such payment, and upon such consent, the clerk may approve the payment without hearing. The clerk may defer ruling on the payment pending the resolution of the application.

(c) Questions regarding the use, location, and disposition of assets that cannot be resolved by the parties and consented to by the clerk shall be decided by the clerk. When a question has not been resolved by agreement, a party may request a hearing before the clerk upon 10 days notice and shall serve the notice upon all parties to the application in accordance with G.S. 1A-1, Rule 4 of the Rules of Civil Procedure.

(d) Decisions of the clerk under this section may be appealed to the superior court pursuant to G.S. 1-301.3.

"§ 31-68. Settlement agreement; filing of judgment.

(a) Prior to an entry of judgment by the superior court in an action upon an application under this Article, the parties may enter into a settlement agreement, which must be approved by the superior court. Upon approval of a settlement agreement, the court shall enter judgment, without a verdict by a jury, in accordance with the terms of the settlement agreement. The consent of parties who are not aligned as parties and who have been dismissed from the action pursuant to G.S. 31-66 is not necessary for a settlement agreement under this section.

(b) When judgment is entered by the superior court in an application under this Article, the clerk shall file a copy of the judgment in the estate file."

SECTION 2. G.S. 28A-2-4(c) reads as rewritten:

"(c) Without otherwise limiting the jurisdiction of the Superior Court Division of the General Court of Justice, the clerk of superior court shall not have jurisdiction ~~under subsection (a) or (c) of this section~~ of the following:

- (1) Actions by or against creditors or debtors of an estate, except as provided in Article 19 of this Chapter.
- (2) Actions involving claims for monetary damages, including claims for breach of fiduciary duty, fraud, and negligence.
- (3) Caveats, except as provided under G.S. 31-36.
- (4) Proceeding to determine proper county of venue as provided in G.S. 28A-3-2.
- (5) Recovery of property transferred or conveyed by a decedent with intent to hinder, delay, or defraud creditors, pursuant to G.S. 28A-15-10(b).

(6) Actions for reformation or modification of wills under Article 10 of Chapter 31 of the General Statutes, except as provided under G.S. 31-66."

SECTION 3. G.S. 7A-307 reads as rewritten:

"§ 7A-307. Costs in administration of estates.

(a) In the administration of the estates of decedents, minors, incompetents, of missing persons, and of trusts under wills and under powers of attorney, in trust proceedings under G.S. 36C-2-203, in estate proceedings under G.S. 28A-2-4, and in collections of personal property by affidavit, the following costs shall be assessed:

...

(5) For the filing of a caveat to a ~~will~~, will under Article 6 of Chapter 31 of the General Statutes or a reformation or modification of a will under Article 10 of Chapter 31 of the General Statutes, the clerk shall assess for support of the General Court of Justice, the sum of two hundred dollars (\$200.00).

...."

SECTION 4. This act becomes effective [insert proposed effective date], and applies to estates of decedents dying before, on, or after that date.